



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Unison Transformer Services, Inc.  
**File:** B-232434.2  
**Date:** November 30, 1988

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### **DIGEST**

Protest that information submitted by awardee to contracting agency incident to a protest filed in our Office constituted improper post-award discussions is dismissed where the agency award determination was properly made without reference to this information.

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### **DECISION**

Unison Transformer Services, Inc., protests that the National Institute of Standards and Technology, Department of Commerce improperly considered information submitted after best and final offers (BAFOs) to determine that Sun Environmental, Inc. met a definitive responsibility criterion under request for proposals (RFP) No. 52SBNB8C5085, under which Sun had been awarded a contract for the reclassification of certain PCB (polychlorinated biphenyls) electrical transformers<sup>1/</sup> to non-PCB status. We dismiss the protest without obtaining an agency report since it is clear from the material furnished by the protester that the protest is without legal merit. 4 C.F.R. § 21.3(m) (1988).

Unison had initially protested that award to Sun was improper because Sun did not meet a definitive responsibility criterion under the RFP which stated that:

"Prospective contractors will be determined to be non-responsive due to responsibility and . . . not warrant further evaluation of their offer, if the

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<sup>1/</sup> Reclassification is the process by which PCBs are extracted from a transformer and replaced with non-PCB materials.

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offeror fails to provide evidence to document its successful reclassification of at least one high concentration PCB transformer to non-PCB status for a minimum of one year without 'polishing.'"

In our decision, Unison Transformer Services, Inc., B-232434, Nov. 10, 1988, 68 Comp. Gen. \_\_\_, 88-2 CPD ¶ \_\_\_, we held that while Sun did not meet the literal requirement of this definitive responsibility criterion, it had submitted evidence with its proposal of having accomplished a level of achievement in excess of the specified criterion, from which the agency properly could conclude that Sun had satisfied the definitive responsibility criterion by providing an acceptable equivalent. The evidence submitted by Sun consisted of a report of Sun's successful reclassification of a transformer under a Navy contract which remained in non-PCB status for 100 days without polishing, and which was then subjected to disassembly and laboratory testing. This testing established that the total residual PCB content in the reclassified transformer was sufficiently low that the transformer would necessarily remain in non-PCB status for a period in excess of 1 year because even if all of the residual PCB were to leach out simultaneously, the level could not reach the defined PCB status threshold.

In its protest comments, Unison referenced an article published in a professional journal, which Unison asserted called into question whether Sun's performance under this Navy contract evidenced satisfaction of the definitive responsibility criterion. In our decision, we concluded that there was adequate documentation submitted by Sun in its proposal from which the contracting officer reasonably could conclude that the definitive responsibility criterion had been met. Regarding the alleged outside documentation which may have called into question the acceptability of the transformer reclassification, in view of the sufficiency of the evidence of compliance we held that our Office would not reevaluate the quality of the evidence submitted by Sun, or question the contracting officer's judgment.

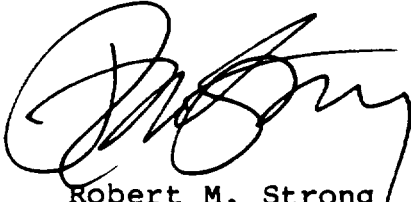
In response to Unison's protest comments, Sun had filed supplemental protest comments on October 31, 1988, in which it stated that there was an unclear reference in the article referred to by Unison, and noted that it had provided Commerce with copies of two proprietary Navy reports which clarified the reference, "for further confirmation." Unison now asserts in this supplemental protest that Sun's comments show that Commerce engaged in discussions with Unison after the submission of BAFOs, in order to resolve

uncertainties in Sun's technical proposal, without contacting the other offerors in the competitive range, and without requesting an additional BAFO, which Unison contends violates the requirements of Federal Acquisition Regulation § 15.611(c) (FAC 84-16).

First, Unison mischaracterizes the issue as one relating to Sun's technical acceptability when the compliance at issue, as Unison has previously acknowledged, pertains to a definitive responsibility criterion. We have specifically held that an agency properly may obtain information from a contractor regarding its responsibility after the submission of BAFOs. Dock Express Contractors, Inc., B-227685.3, Jan. 13, 1988, 88-1 CPD ¶ 23. Moreover, as we held in our decision, Unison Transformer Services, Inc., B-232434, supra, Commerce had a sufficient basis to conclude that Sun had satisfied the definitive responsibility criterion in question from the documentation submitted by Sun with its proposal. The "further confirmation" material provided by Sun was submitted incident to Unison's bid protest to our Office, and there is nothing in the record to suggest that Commerce used this information for any evaluation purposes. Accordingly, Unison's allegation in this regard merely concerns documents relating to an ancillary argument raised under a bid protest, which have no bearing on the conduct of discussions or evaluations under the RFP, and provides no valid basis for protest.

In its supplemental protest, Unison also alleges, for the first time, that Sun's proposed reclassification process is proprietary to Quadrex HPS, Inc., which has filed a patent infringement suit in this regard in the United States District Court for the Southern District of Texas, Houston Division. We note that this patent infringement suit was filed on August 19, 1988, and Unison has not indicated the date on which it learned of the suit. Thus, while it appears that this allegation is untimely filed more than 10 days after the basis for protest was known, in any event, patent infringement allegations are not encompassed within our bid protest function. Ramer Products Ltd.--Reconsideration, B-224027.7, Sept. 28, 1987, 87-2 CPD ¶ 304. Therefore, we will not consider this issue on the merits.

The protest is dismissed without holding the conference requested by Unison since a conference would serve no useful purpose. DeHorn Corp., B-232059, Aug. 9, 1988, 88-2 CPD ¶ 122.

A handwritten signature in black ink, appearing to read 'R. Strong', written over the printed name.

Robert M. Strong  
Associate General Counsel